

1 Edward Gartenberg (State Bar No. 102693)  
Kristin Sciarra (State Bar No. 236247)  
2 GARTENBERG GELFAND WASSON & SELDEN LLP  
801 South Figueroa Street, Suite 2170  
3 Los Angeles, California 90017  
Telephone: (213) 542-2100  
4 Facsimile: (213) 542-2101  
E-mail: [egartenberg@ggwslaw.com](mailto:egartenberg@ggwslaw.com)  
5 [ksciarra@ggwslaw.com](mailto:ksciarra@ggwslaw.com)

6 Attorneys for Defendant and Movant  
MYXER, INC.

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 ARISTA RECORDS, LLC, a Delaware  
12 limited liability company; *et al.*,

13 Plaintiffs,

14 vs.

15 MYXER INC., f/k/a mVISIBLE  
16 TECHNOLOGIES, INC. *et al.*,

17 Defendants.  
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Case No.: CV 08-03935 GAF(JCx)

**DEFENDANT MYXER, INC.'S  
SUPPLEMENTAL  
MEMORANDUM IN REPLY TO  
VERIZON'S JOINT STIPULATION**

**[Filed Concurrently with the  
Declaration of Kristin Sciarra filed in  
Support of Myxer's Memorandum in  
Reply]**

Date: April 27, 2010

Time: 9:30 a.m.

Judge: Hon. Jacqueline Chooljian

Courtroom: 20 – 3<sup>rd</sup> Floor of Spring

Street Courthouse

Trial date: None currently set

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Myxer Inc. (“Myxer”) respectfully requests that this Court conduct an *in camera* review of documents responsive to three privilege log entries, which totals a review of four pages. The sole privilege Cellco Partnership d/b/a Verizon Wireless (“Verizon”) asserts in its portion of the Joint Stipulation is the work product privilege.<sup>1</sup> Verizon has used its manufactured work product privilege claim as an attempt to shield from discovery facts that go to the heart of this matter, are admittedly relevant (Declaration of Kristin Sciarra “Sciarra Decl.” ¶ 4), and are not protected by the work product doctrine. Not only were the emails at issue by and among *non-attorneys*, because Verizon is not and has never been a party to the instant litigation, there was no genuine legal threat against Verizon whatsoever. Thus, Myxer has a reasonable and good faith belief that an *in camera* review of the materials will confirm that the work product privilege does not apply. See In re: Grand Jury Investigation v. The Corporation, 974 F. 2d 1068, 1071 (9th Cir. 1992). The communications at issue are plainly relevant and discoverable, and Myxer requests that the Court conduct an *in camera* review of these communications and order that these and all related responses be produced.

### II. PROCEDURAL BACKGROUND

During meet and confer efforts, Verizon’s counsel agreed to show Myxer’s counsel a portion of one e-mail withheld and identified in Verizon’s privilege log entries 21, 22, or 23. Sciarra Decl. ¶ 4. Verizon’s counsel explained that a certain portion of a communication was the sole reason for withholding all of the e-mails identified in privilege log entries 21, 22, and 23.<sup>2</sup> Sciarra Decl. ¶ 4. Importantly, prior to doing this, Verizon’s counsel conditioned its showing Myxer’s counsel the

<sup>1</sup> Apparently Verizon has abandoned any claim of attorney-client privilege (contrary to its representations in its privilege log).

<sup>2</sup> Verizon’s counsel did not allow Myxer’s counsel to review these documents in their entirety. Sciarra Decl. ¶ 4.

1 communications upon Myxer's agreement that it would not use the information  
 2 revealed in the communications in any way, whether in litigation or otherwise.  
 3 Sciarra Decl. ¶ 5 **"This would include (for example and without limitation)**  
 4 **disclosing the contents of the privileged communications in any filings before**  
 5 **the Court."** Sciarra Decl. ¶ 6 (emphasis added). *Now, in its portion of the Joint*  
 6 *Stipulation – Verizon criticizes Myxer for complying with the very agreement it*  
 7 *dictated.* While Verizon argues that Myxer fails to discuss facts other than the fact  
 8 that no attorney was included on the privilege log entries for the documents to  
 9 support its motion, *this fact is the only fact that Verizon's non-disclosure condition*  
 10 *allowed Myxer to address.* See Joint Stipulation, 9:15-18. Further, while requiring  
 11 that Myxer refrain from any mention of the "privileged" communications, Verizon  
 12 went ahead and set forth in its papers facts helpful only to its side of the story.

13 In fact, the first time that Verizon produced a redacted version of the  
 14 documents at issue and identified in entries 21, 22, and 23 of its privilege log was  
 15 on March 23, 2010 – *at the same time it provided its portion of the Joint Stipulation*  
 16 *which was filed on March 25, 2010.* Sciarra Decl. ¶ 8. Also at that time, Verizon  
 17 advised Myxer that it could now comment on the "unredacted portions of these  
 18 documents." Sciarra Decl. ¶ 8. By then Myxer had prepared its portion of the Joint  
 19 Stipulation, and making any changes at that point addressing the unredacted  
 20 portions of the e-mails at issue would not only be improper under Local Rule 37, it  
 21 would pose a further delay to the instant motion. Thus, Myxer addresses these  
 22 issues in this supplemental brief.

### 23 **III. THE COURT SHOULD REVIEW *IN CAMERA* THE E-MAILS** 24 **IDENTIFIED IN ENTRIES 21, 22 AND 23 OF VERIZON'S** 25 **PRIVILEGE LOG**

#### 26 **A. There is a Reasonable Belief that the Work Product Privilege Does** 27 **Not Apply**

1 The work product protection is designed to protect the work product of an  
 2 adversary, not a third party who is not anticipated to be a party to the litigation.  
 3 Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co., 117 F.R.D. 292, 298  
 4 (D.D.C. 1987) (court refused to extend work product protection to audit letters  
 5 prepared by an attorney where Magistrate Judge's *in camera* examination revealed  
 6 that they were not prepared to assist the company in present or reasonably  
 7 anticipated litigation). Under either the “primary purpose” test or the “because of”  
 8 test cited by Verizon in its papers, the e-mails at issue are not protected by the work  
 9 production privilege because it cannot fairly be said that the “document was created  
 10 because of anticipated litigation, and would not have been created in substantially  
 11 similar form but for the prospect of that litigation.” In re Grand Jury Subpoena, 357  
 12 F.3d 900, 908 (9th Cir. 2003).

13 Verizon is not and never has been an adversary of Myxer in this litigation  
 14 (Sciarra Decl. ¶ 11).<sup>3</sup> The work product protection is not intended to broadly  
 15 protect communication between non-attorneys even if an attorney has generalized  
 16 concerns about non-threatened litigation. If that were the standard, almost any  
 17 internal business communication could be deemed privileged on the theory that a  
 18 corporation’s counsel commonly has concerns about possible litigation.

19 Notably, Mr. Ashby’s declaration does not state that he advised Ed Ruth (the  
 20 author of Exhibit D to the Declaration of Kristin Sciarra, pages 222, 223, an email  
 21 from Mr. Ruth, a non-attorney to three other non-attorneys) that Mr. Ashby was  
 22 directing Mr. Ruth to do an investigation because of actual or threatened litigation.  
 23 To the contrary the redacted email suggests the opposite—it is Mr. Ruth that is  
 24 raising the concern about being pulled into litigation. See Sciarra Decl. ¶ 10, Ex. D.

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 27 <sup>3</sup> Verizon’s reference to “comments” submitted in connection with a pending FCC  
 28 “matter” do not amount to litigation between Myxer and Verizon. Moreover,  
 Verizon fails to establish that the FCC “matter” has anything to do with the  
 documents at issue here.

1 The litigation between Myxer and UMG had already begun and Verizon's  
 2 investigations did not contribute to, or assist in the litigation. It appears that  
 3 Verizon was reviewing issues separate and apart from the litigation, for its own  
 4 business purposes and relations with Plaintiff UMG, and thus is precisely the type  
 5 of communication that Myxer is searching for to support its copyright misuse  
 6 defense against Plaintiff UMG.

7 Here, Verizon's counsel Brian Ashby's statement that he, "became concerned  
 8 that the copyright holders, or even Myxer itself, might later assert claims against  
 9 Verizon in litigation," does not rise to the level of anticipated litigation as required  
 10 to extend work product protection to non-attorney communications. Mr. Ashby  
 11 also fails to state any reason for this concern. Verizon further fails to set forth any  
 12 threat made by either plaintiff record labels or Myxer. Moreover, Verizon provides  
 13 no legal theory or potential claim that could realistically be asserted. One counsel's  
 14 unfounded and unsupported suspicion cannot create a legal threat that simply never  
 15 existed. Thus, even if the underlying communications provide facts helpful to the  
 16 investigation by Verizon's lawyer – there was no real or imminent threat of  
 17 litigation prompting this investigation. Sciarra Decl. ¶ 11.

18 Verizon seeks to shield facts from Myxer (*e.g.*, the responses from Verizon  
 19 employees) that go to the heart of this matter, are admittedly relevant (Sciarra Decl.  
 20 ¶ 4), and are not protected by the work product doctrine. Factual responses from  
 21 Verizon employees are not shielded from discovery. See Casson Constr. Co. v.  
 22 Armco Steel Corp., 91 F.R.D. 376 (D. Kan. 1980) (work product protection does  
 23 not shield from discovery facts that the attorney has learned, or the existence of  
 24 documents, even though the documents in which the attorney may have  
 25 communicated that knowledge may be protected); Koch Materials Co. v. Shore  
 26 Slurry Seal, Inc., 208 F.R.D. 109, 121 (D.J.N. 2002) ("The plaintiff may choose in  
 27 what form it produces relevant factual information. But, it cannot withhold relevant  
 28 information on the basis of attorney work product."). Indeed, courts have declined

to extend work product protection to attachments, supporting documents to an attorney memorandum. Willingham v. Ashcroft, 228 F.R.D. 1, 7 (D.D.C. 2005) (noting that "if attaching a non-privileged document to a privileged one would automatically prevent it from being discoverable, the liberal discovery contemplated by the federal rules would be obviated.").

Verizon has no stake in the copyrights at issue in this case, so it does not make sense that they would be a party on either side of the instant case. Even if they were seriously y concerned the labels were going to sue them based on Myxer's activities, they can't use that to shield indisputably relevant factual data about Myxer's alleged infringing conduct.

**B. The Court Should Exercise Its Discretion to Review the Documents Because an *In Camera* Review is Appropriate**

The Court should review the document at issue because the request is limited, the documents are directly relevant to the copyright misuse defense which could be dispositive for Myxer, and because based on an analysis of the documents at issue, the work product privilege does not apply.

**IV. VERIZON'S REQUEST FOR FEES SHOULD BE DENIED**

Both Verizon and Myxer have engaged in extensive meet and confer efforts and they have resolved nearly every issue. Only this one narrow issue with potentially dispositive implications remains. For the reasons provided above, at a minimum, there is substantial justification for this motion.

**V. CONCLUSION**

For the reasons provided above, Myxer requests that this Court grant an *in camera* review of the documents.

Dated: April 13, 2010 GARTENBERG GELFAND WASSON & SELDEN LLP

By: 

Edward Gartenberg  
Kristin Sciarra

Attorneys for Defendant MYXER INC.